UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

EDWARD SEELY, *et al.*, Plaintiffs, v. ISIDRO BACA, *et al.*, Defendants.	3:15-cv-00118-MMD-VPC (Consolidated With 3:15-cv-00124-MMD-VPC and 3:15-cv-00126-MMD-WGC) **AMENDED[1] REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is defendants motion for summary judgment. (ECF No. 78.) Plaintiffs opposed, (ECF No. 91), and defendant replied, (ECF No. 102). Having thoroughly reviewed the record, the court hereby recommends that the motion for summary judgment be denied in part and granted in part, as discussed below.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs Edward Seely ("Seely"), André Boston ("Boston"), and William Lyons ("Lyons") (collectively, "plaintiffs") are inmates at Northern Nevada Correctional Center ("NNCC") in Carson City, Nevada. Pursuant to 42 U.S.C. § 1983, plaintiffs bring a consolidated civil rights action against prison officials at NNCC and Nevada Department of Corrections ("NDOC"). Plaintiffs allege violations of Title II of the Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act ("RA"), the Eighth Amendment, and the Fourteenth Amendment.

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[1] The original Report and Recommendation, (ECF No. 103), contained a clerical error recommending that the clerk enter judgment and close the case. The court may *sua sponte* correct a clerical error whenever one is found in the judgment, order, or other part of the record. FED. R. CIV. P. 60(a). In order to conform to the court's "contemporaneous intent" that plaintiffs' case proceed to trial, this Amended Report and Recommendation removes the recommendation that the clerk enter judgment and close the case. *Metso Minerals, Inc. v. Powerscreen Int. Distribution Ltd.*, 297 F.R.D. 213 (E.D.N.Y. 2014). This amendment corrects a clerical error only; therefore, the parties need not refile the objection to report and recommendation (ECF No. 104) or the response (ECF No. 107).

Plaintiffs brought separate civil rights complaints that raise identical claims.[2] Plaintiffs allege generally that prison officials at NNCC implemented an inmate level system that violates their constitutional rights because it denies them access to adequate outdoor exercise facilities, requires them to obtain employment in order to obtain a more favorable custody level despite the lack of employment opportunities for disabled inmates, and treats them differently than similarly situated inmates. (ECF No. 6.) Plaintiffs also allege that NNCC's exercise facilities are not ADA-compliant and that prison officials failed to provide plaintiffs with reasonable accommodations. (*Id.*)

On October 19, 2015, the court screened plaintiffs' separate complaints. (*See* ECF No. 6; ECF No. 4 in 3:15-CV-00124-MMD-VPC; ECF No. 5 in 3:15-CV-00126-MMD-VPC.) The court's screening permitted plaintiffs' Eighth Amendment conditions of confinement claims, ADA and RA claims, and Fourteenth Amendment equal protection claims to proceed against NNCC Warden Isidro Baca, NNCC Associate Warden Ron Schreckengost, NNC Associate Warden Lisa Walsh, NDOC Deputy Director E.K. McDaniel, NDOC Director Greg Cox, Board of Prisons ("BOP") Commissioner Brian Sandoval, BOP Commissioner Catherine Cortez-Masto, and BOP Commissioner Ross Miller. (*See* ECF No. 5 at 10.)

On March 5, 2015, Boston and Lyons filed motions to join Seely's case. (ECF No. 3 in 3:15-CV-00124-MMD-VPC and 3:15-CV-00126-MMD-VPC.) The court granted Boston and Lyon's motions to join on March 1, 2016.[3] (ECF No. 18.)

Defendants moved for summary judgment, (ECF No. 78), plaintiffs opposed, (ECF No. 91), and defendants replied (ECF No. 102). This recommended disposition follows.

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[2] Boston's complaint is filed at ECF No. 5 in Case No. 3:15-CV-00124-MMD-VPC and Lyons's complaint is filed at ECF No. 6 in Case No. 3:15-CV-MMD-WGC. Seely's complaint is filed at ECF No. 6 in the instant action.

[3] The parties stipulated to substitute Attorney General Adam Paul Laxalt ("Laxalt") for Cortez-Masto and Secretary of State Barbara Cegavske ("Cegavske") for Miller. (ECF No. 22.) Because Cortez-Masto and Miller were sued only in their official capacities but no longer BOP Commissioners, the court found good cause to order the substitution. (ECF No. 24.)

II. LEGAL STANDARD

Summary judgment allows the court to avoid unnecessary trials. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). The court properly grants summary judgment when the record demonstrates that "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). "[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). A dispute is "genuine" only where a reasonable jury could find for the nonmoving party. *Id.* Conclusory statements, speculative opinions, pleading allegations, or other assertions uncorroborated by facts are insufficient to establish a genuine dispute. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007); *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081–82 (9th Cir. 1996). At this stage, the court's role is to verify that reasonable minds could differ when interpreting the record; the court does not weigh the evidence or determine its truth. *Schmidt v. Contra Costa Cnty.*, 693 F.3d 1122, 1132 (9th Cir. 2012); *Nw. Motorcycle Ass'n*, 18 F.3d at 1472.

Summary judgment proceeds in burden-shifting steps. A moving party who does not bear the burden of proof at trial "must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element" to support its case. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Ultimately, the moving party must demonstrate, on the basis of authenticated evidence, that the record forecloses the possibility of a reasonable jury finding in favor of the nonmoving party as to disputed material facts. *Celotex*, 477 U.S. at 323; *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002). The court views all evidence and any inferences arising therefrom in the light most favorable to the nonmoving party. *Colwell v. Bannister*, 763 F.3d 1060, 1065 (9th Cir. 2014).

Where the moving party meets its burden, the burden shifts to the nonmoving party to "designate specific facts demonstrating the existence of genuine issues for trial." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (citation omitted). "This burden is not a light one," and requires the nonmoving party to "show more than the mere existence of a scintilla of evidence. . . . In fact, the non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the non-moving party's favor." *Id.* (citations omitted). The nonmoving party may defeat the summary judgment motion only by setting forth specific facts that illustrate a genuine dispute requiring a factfinder's resolution. *Liberty Lobby*, 477 U.S. at 248; *Celotex*, 477 U.S. at 324. Although the nonmoving party need not produce authenticated evidence, Fed. R. Civ. P. 56(c), mere assertions, pleading allegations, and "metaphysical doubt as to the material facts" will not defeat a properly-supported and meritorious summary judgment motion, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986).

For purposes of opposing summary judgment, the contentions offered by a *pro se* litigant in motions and pleadings are admissible to the extent that the contents are based on personal knowledge and set forth facts that would be admissible into evidence and the litigant attested under penalty of perjury that they were true and correct. *Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir. 2004).

III. DISCUSSION

A. Legal Standards for Civil Rights Claims under § 1983

42 U.S.C. § 1983 aims "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights." *Anderson v. Warner*, 451 F.3d 1063, 1067 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000)). The statute "provides a federal cause of action against any person who, acting under color of state law, deprives another of his federal rights[,]" *Conn v. Gabbert*, 526 U.S. 286, 290 (1999), and therefore "serves as the procedural device for enforcing substantive provisions of the Constitution and federal statutes," *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). Claims under section 1983 require a plaintiff to allege (1) the violation of a federally-protected right by (2) a person or

official acting under the color of state law. *Warner*, 451 F.3d at 1067. Further, to prevail on a section 1983 claim, the plaintiff must establish each of the elements required to prove an infringement of the underlying constitutional or statutory right.

1. Eighth Amendment Conditions of Confinement Standard

"It is undisputed that the treatment a prisoner receives in prison and the conditions under which [the prisoner] is confined are subject to scrutiny under the Eighth Amendment." *Helling v. McKinney*, 509 U.S. 25, 31 (1993). Conditions of confinement may, consistent with the Constitution, be restrictive and harsh. *See Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). However, prisons must not deprive inmates of a human need such as food, warmth, or exercise. *Wilson v. Seiter*, 501 U.S. 294, 304 (1991). In evaluating a prisoner's claim, courts consider (1) whether prison guards assaulted the prisoner "with a sufficiently culpable state of mind" and (2) whether the alleged wrongdoing was objectively "harmful enough" to establish a constitutional violation. *Hudson*, 503 U.S. at 8.

As to the subjective prong of the Eighth Amendment analysis, prisoners must establish that prison officials were deliberately indifferent to unconstitutional conditions of confinement to establish an Eighth Amendment violation. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Wilson*, 501 U.S. at 303. A prison official exhibits deliberate indifference when he knows or has reason to know that a harm to a prisoner's federally protected right is substantially likely, but fails to act upon that substantial likelihood. *See Farmer*, 511 U.S. at 832; *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001).

When determining whether the conditions of confinement meet the objective prong of the Eighth Amendment analysis, the court must analyze each condition separately to determine whether that specific condition violates the Eighth Amendment. *See Toussaint*, 801 F.2d 1080, 1107 (1986). "Some conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise — for example, a low cell temperature at night combined with a failure to issue

blankets." *Wilson v. Seiter*, 501 U.S. 294, 304 (1991); *see also Thomas v. Ponder*, 611 F.3d 1144, 1151 (9th Cir. 2010). When considering the conditions of confinement, the court should also consider the amount of time to which the prisoner was subjected to the condition. *See Hutto v. Finney*, 437 U.S. 678, 686-87 (1978); *Norwood v. Vance*, 591 F.3d 1062, 1070 (9th Cir. 2005) (temporary denial of outdoor exercise with no medical effects is not a substantial deprivation).

2. Fourteenth Amendment Equal Protection Standard

"The Equal Protection Clause requires the State to treat all similarly situated people equally." *Shakur v. Schriro*, 514 F.3d 878, 891 (9th Cir. 2008) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)). "In the prison context, however, even fundamental rights such as the right to equal protection are judged by a standard of reasonableness — specifically, whether the actions of prison officials are 'reasonably related to legitimate penological reason.'" *Walker v. Gomez*, 370 F.3d 969, 974 (9th Cir. 2004) (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987); *Jordan v. Gardner*, 986 F.2d 1521, 1530 (9th Cir. 1993).

The preliminary inquiry in an equal protection claim is identifying the plaintiffs' relevant class, which is "comprised of similarly situated persons so that the factor motivating the alleged discrimination can be identified." *Furnace v. Sullivan*, 705 F.3d 1021, 1030 (9th Cir. 2013) (internal quotation omitted). Then, "a plaintiff must show that the defendant acted with an intent or purpose to discriminate against him based upon his membership in a protected class." *Serrano v. Francis*, 345 F.3d 1071, 1082 (9th Cir. 2003). Because the claim requires proof of intentional discrimination, "[m]ere indifference" to the unequal effects on a particular class does not establish discriminatory intent. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005).

3. Americans With Disabilities Act and Rehabilitation Act Standard

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by such entity." 42 U.S.C. § 12132 (2012). The Supreme Court has held that Title II applies to state prisons. *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998). Courts apply the same standards to discrimination

claims under the RA as they do to discrimination claims under the ADA. *See Walton v. U.S. Marshals Serv.*, 492 F.3d 998, 1003 n.1 (9th Cir. 2007). The Ninth Circuit stated, "[t]here is no significant difference in analysis of the rights and obligations created by the ADA and the [RA]," and thus, if an entity complies with the ADA, they are considered in compliance with the RA as well. *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1045 (9th Cir.1999). In order to prove a claim under the ADA and the RA, a plaintiff must establish that:

> (1) he is an individual with a disability; (2) he is otherwise qualified to participate in or receive the benefit of some public entity's services, programs, or activities; (3) he was either excluded from participation in or denied the benefits of the public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (4) such exclusion, denial of benefits, or discrimination was by reason of [his] disability.

O'Guinn v. Lovelock, 502 F.3d 1056, 1060 (9th Cir. 2007) (citation and quotation omitted). The Ninth Circuit has interpreted the causal language "by reason of" to require that a plaintiff show that a discriminatory reason was a "motivating factor" in the defendant's decision. *Head v. Glacier NW. Inc.*, 413 F.3d 1053, 1065 (9th Cir. 2005). Furthermore, to recover monetary damages, a plaintiff must prove intentional discrimination by the defendant. *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1138-39 (9th Cir. 2001). The standard for intentional discrimination is deliberate indifference, requiring the plaintiff to show that the defendant knew "harm to a federally protected right [wa]s substantially likely" and failed to act upon that likelihood. *Id.* at 1139.

"When the plaintiff has alerted the public entity to his need for accommodations (or where the need for accommodation is obvious, or required by statute or regulation), the public entity is on notice that an accommodation is required, and the plaintiff has satisfied the first element of the deliberate indifference test." *Id.* "In order to meet the second element of the deliberate indifference test, a failure to act must be a result of conduct that is more than negligent, and involves an element of deliberateness." *Id.*

B. Failure to Exhaust Administrative Remedies

1. Exhaustion under the PLRA

The Prison Litigation Reform Act ("PLRA") provides that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Exhaustion is mandatory. *Ross v. Blake*, 136 S.Ct. 1850, 1856-57 (2016); *Porter v. Nussle*, 534 U.S. 516, 524 (2002). The PLRA requires "proper exhaustion" of an inmate's claims. *Woodford v. Ngo*, 548 U.S. 81, 90 (2006). Proper exhaustion means an inmate must "use all steps the prison holds out, enabling the prison to reach the merits of the issue." *Griffin v. Arpaio*, 557 F.3d 1117, 1119 (9th Cir. 2009) (citing *Woodford*, 548 U.S. at 90).

Failure to exhaust is an affirmative defense. *Jones v. Bock*, 549 U.S. 199, 216 (2007). The defendants bear the burden of proving that an available administrative remedy was unexhausted by the inmate. *Albino v. Baca*, 747 F.3d 1162, 1172 (9th Cir. 2014). If the defendants make such a showing, the burden shifts to the inmate to "show there is something in his particular case that made the existing and generally available administrative remedies effectively unavailable to him by 'showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile.'" *Williams v. Paramo*, 775 F.3d 1182, 1191 (9th Cir. 2015) (quoting *Albino*, 747 F.3d at 1172).

2. NDOC's Inmate Grievance System

Administrative Regulation ("AR") 740 governs the grievance process at NDOC institutions. An inmate must grieve through all three levels: (1) Informal; (2) First Level; and (3) Second Level. (*See* Def. Exh. D.) The inmate may file an informal grievance within six months "if the issue involves personal property damages or loss, personal injury, medical claims or any other tort claims, including civil rights claims." (*Id.* at 6.) The inmate's failure to submit the informal grievance within this period "shall constitute abandonment of the inmate's claim at this, and all subsequent levels." (*Id.* at 7.) NDOC staff is required to respond within forty-five days. (*Id.* at

8.) An inmate who is dissatisfied with the informal response may appeal to the formal level within five days. (*Id.*)

At the first formal level, the inmate must "provide a signed, sworn declaration of facts that form the basis for a claim that the informal response is incorrect," and attach "[a]ny additional relevant documentation." (*Id.*) The grievance is reviewed by an official of a higher level, who has forty-five days to respond. (*Id.* at 9.) Within five days of receiving a dissatisfactory first-level response, the inmate may appeal to the second level, which is subject to still-higher review. (*Id.*) Officials are to respond to a second-level grievance within sixty days, specifying the decision and the reasons the decision was reached. (*Id.*) Once an inmate receives a decision disposing of the second-level grievance, he or she is considered to have exhausted available administrative remedies and may pursue civil rights litigation in district court.

An official grievance response that exceeds the timeframe does not result in an automatic finding for the inmate. (*Id.* at 5.) Rather, AR 740.038 requires the official to complete the response, even if it is overdue. (*Id.*) In turn, the inmate may await the response before appealing, with the applicable timeframe suspended until the inmate receives the overdue response. (*Id.*) Alternatively, the inmate may immediately appeal to the next grievance level without awaiting a response, though this option is not available at the second-grievance level.

3. Exhaustion of Seely's Claim

Defendants contend that Seely failed to exhaust his administrative remedies because he did not properly follow the grievance procedure set forth in AR 740, and as a result, prison officials were unable to respond to his grievance on the merits. (ECF No. 78 at 8.) Seely challenges defendants' assertion by claiming that he properly followed AR 740, but administrative remedies were effectively unavailable because his grievance was improperly screened at each stage of the grievance process. (Plaintiffs' Opp. at 12-18.)[4]

[4] Plaintiffs filed a fifty-five-page opposition to defendants' motion for summary judgment. Their opposition is filed at ECF numbers 91, 91-1, and 91-2. To avoid confusion, the court cites to plaintiffs' pagination, e.g., Plaintiffs' Opp. At 13.

Although the PLRA requires exhaustion only of those administrative remedies "as are available," the PLRA does not require exhaustion when circumstances render administrative remedies "effectively unavailable." *See Nunez*, 591 F.3d 1217, 1223-26 (9th Cir. 2010). The Ninth Circuit recognizes that "improper screening of an inmate's administrative grievances renders administrative remedies 'effectively unavailable' such that exhaustion is not required under the PLRA." *Sapp v. Kimbrell*, 623 F.3d 813, 823 (9th Cir. 2010). To meet this exception to the exhaustion requirement, an inmate "must establish (1) that he actually filed a grievance or grievances that, if pursued through all levels of administrative appeals, would have sufficed to exhaust the claim that he seeks to pursue in federal court, and (2) that prison officials screened his grievance or grievances for reasons inconsistent with or unsupported by applicable regulations." *Id.* at 823.

i. Sufficiency of Seely's Grievance Allegations

Defendants contend that Seely failed to exhaust his administrative remedies for his ADA claim of discrimination because his grievances do not allege that he was denied employment opportunities and advancement through the level system due to his disability. (ECF No. 78 at 8.) Seely concedes that his grievance does not discuss the denial of employment opportunities or that he was prevented from advancing through the level system due to his disability. (ECF No. 91-1 at 17-18.) However, it is clear from Seely's grievance that he provided prison officials notice that he had a possible ADA discrimination claim based on his lack of access to exercise facilities suitable to his disability. *Griffin*, 557 F.3d at 1120. He makes repeated reference to his inability to use the athletic field or outdoor bathroom facilities because he is wheelchair bound. (*See* Plaintiffs' Exh. 9.) Thus, the court recommends summary judgment be granted as to Lyons's ADA claim but only to the extent that it is based upon his denial of employment and advancement in the level system.

In addition, the court finds that Seely's grievances, if considered on the merits, would suffice to exhaust his Eighth Amendment claim. His informal grievance alleges that he is prevented from exercising because the athletic field is not ADA accessible. Furthermore, his first

level grievance directly states that he is raising an Eighth Amendment issue. Because deprivation of exercise may amount to a violation of the Eighth Amendment, *Wilson v. Seiter*, 501 U.S. 294, 304 (1991), Seely's Eighth Amendment claim cannot be dismissed for failure to exhaust on this basis.

Finally, defendants claim that Seely failed to exhaust his Fourteenth Amendment equal protection claim. (ECF No. 78 at 8-9.) Defendants argue that Seely failed to file a grievance on the issue of being treated differently from inmates in the SSLP (*Id.*) However, Seely's grievance states that he is denied equal access to exercise available to non-disabled inmates solely because of his disability. (Def. Exh. E at 3-4.) Seely's grievance provided adequate notice to prison officials of the nature of his Fourteenth Amendment claim because it clearly asserts he is treated unequally on the basis of his disability. *See Shakur v. Schriro*, 514 F.3d 878, 891 (9th Cir. 2008). Seely did not need to identify SSLP participants by name at the grievance stage to provide notice of a possible Fourteenth Amendment violation. *See Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009) (an inmate must provide the prison with sufficient notice of "the nature of the wrong for which redress is sought" before litigating his claim).

Accordingly, the court finds that Seely's grievance would have sufficed, if reviewed on the merits, to exhaust his Eighth Amendment claim, his Fourteenth Amendment claim, and his ADA and RA claim that NNCC's exercise facilities are not wheelchair accessible. *Sapp*, 623 F.3d at 823.

ii. Improper Screening

The next issue the court must determine is whether Seely's grievance was screened for improper purposes. Prison officials screened Seely's grievance on four separate occasions. The court considers each screening in turn.

First, the record before the court shows that Seely filed an informal grievance on March 30, 2013. (Def. Exh. E at 1.) Prison officials denied Seely's grievance on substantive grounds. (*Id.* at 2.) They stated that Seely did not allege facts regarding the level system that give rise to a due process violation. (*Id.*) However, Seely did not raise a due process argument nor did he raise

an issue with the level system, and the official response failed to mention Seely's allegations that exercise facilities were not accessible to him. (*Id.*) Thus, this screening was improper because it did not address Seely's allegations as required by AR 740.05(3). (Def. Exh. D at 5.)

Second, Seely filed his first level grievance on July 1, 2013. (Def. Exh. E at 3-4.) His grievance asserts that he had not yet received a response to his informal grievance on that same date. (*Id.* at 4.) Seely's July 1, 2013 first level grievance was returned to him on September 13, 2013, for failure to attach his informal grievance and the official response. (*Id.* at 5.) The response directed Seely to attach these documents and resubmit his first level grievance and cautioned Seely that the failure to do so constitutes abandonment of his grievance. (*Id.*) In his motion, Seely claims that he filed his first level grievance without attaching the response because prison officials exceeded their allotted time frame to respond to his informal grievance by two months, which permitted Seely to proceed to the next level review under AR 740.03(8)(B). (Plaintiffs' Opp. at 13.) According to Seely, he did not receive the official response until July 26, 2013, so it was not possible for him to attach it at the time he submitted his first level grievance. (*Id.* at 12.) Defendants' offer evidence that the informal grievance response was issued to Seely on May 29, 2013. (Def. Exh. E at 2.)

This dispute is immaterial. The record demonstrates that prison officials exceeded their forty-five-day time limit to respond to Seely's informal grievance under AR 740.05(12), (Def. Exh. D at 6), regardless of whether he received it on May 29, 2013, as defendants' contend, or on July 26, 2013, as Seely contends. Under AR 740.03(8)(B), Seely was permitted to file his first level grievance once forty-five days elapsed from the date he filed his informal grievance. Furthermore, he was permitted to do so without attaching the official response to his informal grievance; it would defy logic for this rule to require an inmate to attach a response that he had not yet received. Because Seely notified prison officials that he filed his first level grievance pursuant to AR 740.03(B), (Def. Exh. E at 4), the court finds that prison officials erred in rejecting Seely's July 1, 2013 grievance for failing to attach the official response. *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) ("[C]ourts should not topple over administrative decisions unless the administrative

body not only has erred, *but has erred against objection made at the time appropriate under its practice*.") (internal quotations omitted). Defendants' contention that plaintiff was required to attach the carbon copy of his informal grievance to his July 1, 2013 grievance is immaterial because it does nothing to cure the erroneous conclusion that Seely was required to attach his informal response to begin with. (*See* Def. Exh. E at 5.)

Third, Seely claims that after finally receiving a response to his informal grievance on July 26, 2013, he immediately filed another first level grievance that day. (*Id.* at 13-14.) This first level grievance was returned to him for failure to attach official response to his July 1, 2013, first level grievance. (Def. Exh. E at 8.) Plaintiff asserts that he could not attach the requested response to his July 26, 2013 first level grievance because that response had not been returned to him at the time of filling. (Plaintiffs' Opp. at 14-15.) He filed his July 26, 2013, first level grievance, despite the fact that his July 1, 2013, first level grievance was pending, in an attempt to meet the AR 740.05(12)(A) requirement that inmates appeal an informal grievance within five days of receiving an official response. (*Id.*) Defendants contend only that prison officials permissibly screened Seely's July 26, 2013, grievance for failing to comply with the rules. To the contrary, Seely clearly attempted to comply with the five-day time frame that begins "upon receipt of the [informal] response." (Def. Exh. D at 6.) He also attempted to comply with AR 740.06(2), which states that "any additional relevant documentation should be attached at [the first] level." While Seely had not yet received an official response to his July 1 first level grievance at the time he submitted his July 26 first level grievance, he did have access to, and attached, his returned informal grievance and the response. Defendants do not explain how Seely could have possibly attached an official response that had not yet been returned, and possibly had not yet been written. The vague and permissive language of AR 740.06(2) that inmates "should" attach "any relevant documentation" cannot justify the dismissal of Seely's grievance for failing to bring about a physical impossibility.

Fourth, plaintiff filed his second level grievance on the day he received a response to his July 26 first level grievance, (Def. Exh. E at 9), and prison officials screened his second level grievance for failing to complete the prior levels of the grievance process. (*Id.* at 10-12.)

However, the court determines that prison officials, not Seely, failed to complete the prior levels of the grievance process. The improper application of AR 740's technical requirement to repeatedly reject Seely's grievances gives rise to "a good faith belief that administrative remedies were effectively unavailable." *Sapp*, 623 F.3d at 826. Accordingly, Seely was not required to exhaust his administrative remedies for those claims he alleged in his grievance: his Eighth Amendment claim, Fourteenth Amendment claim, and ADA and RA claim that NNCC exercise facilities are not wheelchair accessible.

4. Exhaustion of Boston's Claim

Defendants contend that Boston failed to properly exhaust his Eighth Amendment claim because his grievance does not allege that he was denied outdoor exercise. (ECF No. 78 at 9.) Boston concedes that he failed to exhaust his Eighth Amendment claim regarding outdoor exercise, (Plaintiffs' Opp. at 19), and a review of his grievances shows that he made no claims regarding outdoor exercise that would put prison officials on notice that an Eighth Amendment violation was afoot. *See Griffin*, 557 F.3d at 1120. The court recommends that summary judgment be granted as to Boston's Eighth Amendment claims for failure to exhaust his administrative remedies.

Defendants also contend that although Boston referenced the ADA in regards to the level system, Boston failed to exhaust his ADA and RA claims regarding NNCC's outdoor exercise facilities and programs. (ECF No. 78 at 9.) Boston does not challenge his failure to grieve ADA and RA claims in the context of NNCC's outdoor exercise facilities. (Plaintiffs' Opp. at 19.) A careful inspection of Boston's grievances confirms that Boston never alleged that NNCC's outdoor exercise facilities were noncompliant with the ADA and RA. (*See* Def. Exh. H; Plaintiffs' Exh. 14.) In contrast, Boston's complaint, which is nearly identical to the complaints filed by Seely and Lyons, directly claims that the outdoor exercise facilities and programs available to level three inmates do not meet the accessibility standards of the ADA and RA. (ECF No. 5 in Case No. 3:15-CV-00124-MMD-VPC.) Boston's failure to raise an issue regarding the accessibility of NNCC's outdoor exercise facilities did not provide the prison with sufficient notice of "the nature

of the wrong for which redress is sought" before litigating this aspect of his ADA and RA claim. *Griffin*, 557 F.3d at 1120. Defendants have carried their burden of establishing that Boston failed to exhaust his administrative remedies for his ADA and RA regarding NNCC's outdoor exercise facilities and programs.

The court recommends granting summary judgment as to Boston's Eighth Amendment claim and as to Boston's ADA and RA claim to the extent that it is based on allegations that NNCC's outdoor exercise facilities are noncompliant with the ADA and RA.

5. Exhaustion of Lyons's Claim

Defendants contend that Lyons failed to exhaust his administrative remedies for his ADA and RA claim of discrimination because his grievances do not allege that he was denied employment opportunities and advancement through the level system due to his disability. (ECF No. 78 at 9-10.) Lyons concedes that he never grieved that he could not obtain employment opportunities or that he was prevented from advancing through the level system due to his disability. (Plaintiffs' Opp. at 22.) The court notes that Lyons's grievance contains no allegation that NNCC denied plaintiff employment opportunities or the opportunity to advance in the level system. (Def. Exh. J.) Rather, Lyons's grievance asserts that the level system discriminated against him because, upon its implementation, NNCC restricted him to exercise facilities that able-bodied inmates could utilize, but that he was prevented from accessing due to his disability. (*Id.*) Lyons's grievance provided prison officials notice that he had a possible ADA discrimination claim based on his lack of access to exercise facilities suitable to his disability, but it did not provide notice of an ADA claim based on a lack of employment and advancement opportunities. *Griffin*, 557 F.3d at 1120. Thus, the court recommends summary judgment be granted as to Lyons's ADA claim, but only to the extent that it is based upon his denial of employment and advancement in the level system.

In their reply, defendants also claim that Lyons failed to exhaust his Fourteenth Amendment equal protection claim. (ECF No. 102 at 5.) Defendants argue that Lyons's grievance makes no reference to the SSLP, nor explains how the level system discriminated against Lyons

on the basis of his disability. (*Id.*) Lyons argues that his grievance provided sufficient notice of the nature of his Fourteenth Amendment claim against the level system. (Plaintiffs' Opp. at 9.) After thoroughly reviewing the record, the court agrees with Lyons. In his grievance, Lyons unambiguously states that the level system is intentionally discriminatory. (Def. Exh. J at 9-10.) He supports his claim by alleging that he was demoted from level one to level two while other similarly situated inmates remained level one, and that this demotion deprived him of exercise facilities that accommodate his disability. (*Id.* at 7.) Lyons's grievance provided adequate notice to prison officials of the nature of his Fourteenth Amendment claim because it clearly asserts that the level system is discriminatory and explains how the level system discriminated against him on the basis of his disability. Lyons did not need to identify SSLP participants by name at the grievance stage to provide notice of a possible Fourteenth Amendment violation. *See Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009) (an inmate must provide the prison with sufficient notice of "the nature of the wrong for which redress is sought" before litigating his claim).

C. Eighth Amendment Conditions of Confinement Claim

Because Boston failed to properly exhaust his Eighth Amendment claim, only Seely and Lyons have Eighth Amendment claims before the court. Defendants contend that Seely and Lyons's Eighth Amendment claims fail because neither Seely nor Lyons was completely denied outdoor exercise. (ECF No. 78 at 10.) Instead, the prison provided Seely, Lyons, and other level three inmates the option to exercise on the outdoor athletic field. (*Id.*) Defendants provide Baca's declaration as evidence that the athletic field is comprised of hard packed dirt and grass that disabled inmates have used to exercise without issue, that any damage the track might cause to a wheelchair can be repaired by the prison, and that NNCC recently paved a new outdoor exercise pad to "increase ADA accessibility." (*Id.*; *see* Def. Exh. A at 2-3.) Seely and Lyons dispute defendants' assertion and provide evidence that the track is inaccessible to wheelchair-bound inmates, such as themselves. (Plaintiffs' Opp. at 41-43.)

The court agrees with Seely and Lyons that summary judgment is improper. Seely and Lyons cite to defendants' admission that the entrance to the athletic field is at an incline, (Exh. 2

at 20), although they mischaracterize defendants' response as an admission that the entrance is at a "down-hill slope." (Plaintiffs' Opp. at 41.) This mischaracterization notwithstanding, Seely and Lyons raise a genuine dispute as to whether a gradient to the entrance of the athletic track prevents them from accessing the track, which is material to whether they are sufficiently deprived of outdoor exercise to constitute a violation of the Eighth Amendment. *See Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979) (deprivation of outdoor exercise for inmates with "meager out-of-cell movements" constitutes cruel and unusual punishment under Eighth Amendment).

Seely and Lyons also provide photographs of footprints in the athletic field, which they interpret as evidence that the field is comprised of soft dirt and sand rather than hard-packed dirt. (Def. Exh. A at 2-6, 7-13.) As a result, inclement weather causes the field to "become deteriorated by mud or snow ...." (ECF No. 91-2 at 12-13.) Finally, Seely and Lyons cite to a "wheelchair use agreement" that NDOC and NNCC's medical department required "for many years." (*Id.* at 13.) The wheelchair agreement mandates that inmates who have receive a prison-issued wheelchair must not "roll or push this chair through dirt or up steps, which I acknowledge will cause damage." (Plaintiffs' Exh. 48.) The court finds that Seely and Lyons have produced sufficient evidence for a reasonable jury to conclude that the athletic field was not accessible to them because they require wheelchairs. Should a jury determine that their only avenue for outdoor exercise is the athletic field, such a finding would be material to establishing the objective prong of the Eighth Amendment. *See Toussaint*, 801 F.2d at 1107. Furthermore, the wheelchair agreement is evidence upon which a rational jury could find that defendants were aware or should have been aware that wheelchair bound inmates would be unable to use the athletic field, and thereby deprived of outdoor exercise. Such a finding is material to proving the subjective prong of an Eighth Amendment violation. *See Farmer*, 511 U.S. at 834. Accordingly, the court recommends that summary judgment be denied as to Seely and Lyons's Eighth Amendment claims because they raise genuine disputes of material fact for trial. *Celotex*, 477 U.S. at 330.

D. ADA and RA Claim

Before considering defendants' arguments against plaintiffs' remaining ADA and RA claims, the court must first define the contours of plaintiffs' ADA and RA claim currently before the court. Plaintiffs' separate, but largely identical, complaints allege various factual allegations that support an ADA and RA claim. In light of the court's exhaustion analysis, the court interprets plaintiffs' complaint to raise two separate ADA and RA claims based on different underlying factual allegations: (1) an ADA and RA discrimination claim against the level system, and (2) an ADA and RA accessibility claim based on NNCC's exercise facilities.

The crux of plaintiffs' ADA and RA discrimination claim is that the level system automatically categorizes disabled inmates as level two or three unless they capable of working in one of NNCC's various job assignments. (Plaintiffs' Opp. at 24-34.) Plaintiffs argue that this system of categorization excludes them on the basis of their disability because they are not able-bodied and because their disability prevents them from working. (*Id.*) In contrast, plaintiffs' accessibility claim is based on allegations that the prison facilities themselves are inadequately accessible to inmates with disabilities in violation of the ADA and RA. (Plaintiffs' Opp. 38-51.) The court screened plaintiffs' complaints and allowed them to proceed on their ADA and RA claim based upon the denial of employment and advancement opportunities in the level system, as well as the noncompliant exercise facilities at NNCC.

However, given that the court determines that Boston failed to grieve any facts relating the accessibility of NNCC's outdoor exercise facilities, the court must construe his claim as an ADA and RA discrimination claim only. Allowing Boston to proceed on an ADA and RA noncompliance claim would be prejudicial to defendants and violate the PLRA because defendants were never given the opportunity to internally remedy the noncompliant feature of their exercise facilities that injured Boston. *See Porter*, 534 U.S. at 525. Construing Boston's ADA and RA claim in this way is in accord with plaintiffs' descriptions of their respective disabilities. While Seely and Lyons are confined to wheelchairs, Boston is able to walk but suffers from a severe lung disease. (Def. Exh. C; Plaintiffs' Opp. at 18.) Any ADA and RA accessibility claim Boston might have rests on

different factual allegations of inaccessibility than those supporting Seely and Lyons's accessibility claim.

Given that the court finds that both Seely and Lyons failed to grieve any facts relating to denial of employment opportunities or denial of advancement in the level system, the court must construe their claims as ADA and RA accessibility claims. *See Porter*, 534 U.S. at 525. Lyons contends that he grieved that the level system was discriminatory, but his discrimination allegations were based on being unable to access the exercise facilities available to him as a level two inmate. (Plaintiffs' Opp. at 22.) An ADA and RA claim of noncompliance addresses the implicit discrimination that Lyons complained of in his grievance. Seely, on the other hand, concedes that did not raise an issue against the level system in his grievance. (*Id.* at 18.) Thus, neither Seely nor Lyons can join in on Boston's ADA and RA discrimination claim, while Boston cannot join in on Seely and Lyons' ADA and RA accessibility claims.

1. Boston's ADA and RA claim

Defendants contend that they are entitled to summary judgment against Boston's ADA and RA claim that he has been denied advancement through the level system because of his disability. (ECF No. 78 at 12-14.) The level system does not require disabled inmates to be classified as a certain level because of their disability, nor does it preclude disabled inmates from obtaining employment or advancing to the next level. (*Id.* at 13; *see* Def. Exh. A, B.) It was designed to incentivize good behavior and control the movements of inmates based on their performance in certain criteria, such as employment status. (Def. Exh. A at 1; Def. Exh. B at 1-2.) According to Warden Baca's declaration, disabled inmates can request accommodations for job assignments to aid their advancement in the level system, and many disabled inmates have done so. (Def. Exh. A at 1.) Defendants argue that Boston's failure to advance through the level system is due to his failure to obtain and maintain a job assignment, not because of his disability. Boston's case notes for the relevant period reflect that he has not applied for any work positions, much less has been denied a job due to his disability. (*Id.* at 14; *see* Def. Exh. N.)

Plaintiff does not challenge the lack of discriminatory language within the level system

guidelines. Rather, Boston argues that he is unable to secure a job assignment because of his disability. Boston holds a paralegal certificate from Blackstone School of Law and applied to a position as a law clerk, but was denied because NNCC required him to commit to ninety days of yard duty or culinary work. (Plaintiffs' Opp. at 49.) He claims that his severe lung illness prevents him from engaging in yard duty or culinary work, and NNCC offered no reasonable accommodation for him to complete this prerequisite to becoming a law clerk. (*Id.*) Defendants' point out Boston's admission that he did not seek a reasonable accommodation for yard duty or culinary work. (*Id.*; ECF No. 78 at 14.)

Taking the evidence in the light most favorable to Boston, the court cannot conclude that Boston has raised a genuine dispute that he was denied employment, and thereby denied the ability to advance in the level system, by reason of his disability. Boston's claim that he holds a paralegal certificate is sufficient evidence that he is qualified for a law clerk position at NNCC under the ADA and RA. *See O'Guinn*, 502 F.3d at 1060 (setting out elements of an ADA and RA claim). However, his claim that he was denied this position because he did not commit to ninety days of yard duty or culinary duty plainly establishes that the reason he was denied that position was because of his choice not to work on the yard or in the kitchen. While it is true that the refusal to provide a reasonable accommodation may be discriminatory, *see Pierce v. County of Orange*, 526 F.3d 1190 (2008), Boston admits that he never requested a reasonable accommodation. He self-screened himself from the yard duty and culinary work commitments, which establishes only that he was denied his law clerk position because of a personal choice, rather than because of his disability. A reasonable jury cannot find on the basis of this evidence that "a discriminatory reason was a motivating factor" in the defendant's decision to deny him a job as a law clerk. *Head v. Glacier NW. Inc.*, 413 F.3d 1053, 1065 (9th Cir. 2005). Boston's evidence that light-duty jobs he was capable of performing were eliminated, and evidence that education was removed as a criterion for advancement in the level system, fails to raise a genuine dispute of material fact because plaintiff is unable to show that he could not attain employment and advance in the level system due to his disability. (Plaintiffs' Opp. at 28-29; *see* Plaintiffs' Exh. 32 at 4.) The court recommends that

summary judgment be granted as to Boston's ADA and RA claim that the level system is discriminatory.

2. Seely and Lyons's ADA and RA Accessibility Claims

Under the regulations promulgated by Title II of the ADA, public entities must operate each service, program, and activity so that the service, program or activity, when viewed in its entirety, is readily accessible and usable by individuals with disabilities." 28 C.F.R. §35.150(a)(3) (2017). However, a public entity need not "make each of its existing facilities accessible to and usable by individuals with disabilities," and it is not required "to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." *Id.* § 35.150(a)(3). "Where reasonable alternative methods achieve compliance, structural changes to existing facilities need not be made." *Pierce v. Cty. of Orange*, 526 F.3d 1190, 1219 (9th Cir. 2008)

Defendants do not directly challenge Seely and Lyons's remaining ADA and RA claim that NNCC's exercise facilities are inaccessible to them because of their disabilities. However, defendants dispute that the athletic field is inaccessible in their argument that Seely and Lyons' have not been deprived outdoor exercise in violation of the Eighth Amendment. (ECF No. 72 at 10–11.) As determined above, Seely and Lyons succeed in raising a genuine issue of material fact as to whether the athletic field is accessible.

Additionally, Seely and Lyons provide evidence that a large portion of NNCC's gym is inaccessible to them. They cite to defendants' admissions and photos that the stationary exercise equipment is located on a stage platform area that does not have safety rails to accommodate wheelchair bound inmates. (Plaintiffs' Opp. at 44.) They also provide evidence that the toilets in the gym lack a transfer bar for facilitating transfers between the toilet and a wheelchair, and that the restroom sinks and drinking fountains do not comply with ADA standards for accessible design. (*Id.*; Plaintiffs' Exh. 4 at 4.) Defendants admit that these facilities are non-compliant, and claim only that remedial steps are being taken. (*Id.*) Seely and Lyons provide extensive evidence

sufficient for a jury to find that NNCC's gym facilities violate the accessibility requirements of the ADA and RA. *See Ricci v. DeStefano*, 557 U.S. 557, 586 (2009).

Finally, Seely and Lyons provide evidence that there are no outdoor bathrooms or facilities for the disabled and non-disabled to use during the mandated recreational time. (Plaintiffs' Opp. at 43) (citing ECF No. 91-3 at 6). Defendants maintain that there is a urinal at the weight area next to the athletic field, but admit that the urinals are locked during level two and level three recreational time, and do not have safety rails to accommodate disabled inmates. (Plaintiffs' Exh. 2 at 19-20.) Although the ADA does not mandate that a public entity make each of its existing facilities accessible, the evidence tends to show that there is no accessible outdoor bathroom, and that NNCC's gym bathrooms are also inaccessible. Defendants' contend that Seely and Lyons are able to use indoor ADA-compliant bathroom facilities, (ECF No. 102 at 8), but whether this is a reasonable alternative is a factual issue for the jury to decide. *Pierce*, 526 F.3d at 1219.

Seely and Lyons have met their burden of demonstrating that a genuine issue of material fact exists as to whether the accessibility of the athletic field, gym, and outdoor bathrooms are inaccessible to them due to their disabilities. Defendants' evidence is insufficient to preclude a reasonable jury from finding in Seely and Lyons's favor, and defendants fail to demonstrate that any reasonable modifications would fundamentally change the nature of NNCC's outdoor exercise program or result in an undue burden. *See Peirce*, 526 F.3d at 1214-17. Accordingly, the court recommends that summary judgment be denied as to Seely and Lyons's claims that NNCC exercise facilities are inaccessible to them.

E. Fourteenth Amendment Claim

Defendants allege that plaintiffs' Fourteenth Amendment claim must fail because they cannot establish that they are similarly situated to SSLP participants or that defendants excluded plaintiffs with discriminatory intent. (ECF No. 78 at 15, 16.) Plaintiffs contend that they are similarly situated to members of SSLP because many SSLP participants are disabled. (Plaintiffs' Opp. at 37.) The court agrees with defendants. To be eligible for SSLP, inmates must be at least sixty years old and the program manager must recommend inmates for placement in SSLP. (Def.

Exh. M at 2.) Schreckengost's declaration states that defendants are not eligible for SSLP because they are younger than sixty years of age and because they have never sought the recommendation of the SSLP program manager. (Def. Exh. F at 4.) Plaintiffs do not contest Schreckengost's declaration. As a result, plaintiffs are unable to establish that they are similarly situated to SSLP members who are not subject to the restrictions of the level system. Plaintiffs' Fourteenth Amendment claim is based entirely on their unequal treatment vis-à-vis SSLP participants whose age is akin to a disability. (*See* ECF No. 4 at 32.) Without the ability to establish that they are similarly situated to SSLP participants, plaintiffs will be unable to identify "the factor motivating the alleged discrimination," much less prove that defendants' alleged discrimination against plaintiffs was motivated by their status as persons with disabilities. *Furnace*, 705 F.3d at 1021. Even assuming that plaintiffs and SSLP participants are similarly situated, the eligibility requirements for the SSLP clearly show that plaintiffs are excluded from receiving the benefits that SSLP members receive because they are too young, not because they are disabled. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985) (classifications based on age are not suspect classification under the Fourteenth Amendment); *see Presnick v. Berger*, 837 F. Supp 475, 477 (1993) (non-senior adults are not suspect class). Indeed, plaintiffs admit and rely on the fact that the SSLP has disabled participants. (*See* ECF No. 91 at 14.) No reasonable jury can find that disability was a motivating factor in the defendants' decision to implement policy that provides favorable treatment to SSLP participants, but not plaintiffs. Accordingly, the court recommends that summary judgment be granted against plaintiffs' Fourteenth Amendment claims.

F. Supervisory Liability

Defendants argue that they are entitled to summary judgment because plaintiffs fail to establish that Baca, Cox, McDaniel, Schreckengost, and Walsh personally participated in the alleged violation of plaintiffs' constitutional and statutory rights. Defendants do not extend this argument to Sandoval, Laxalt, or Cegavske because they remain defendants solely in their official capacities for the purpose of providing prospective injunctive relief. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) (official capacity claims are based upon a theory of a local

governmental unit's wrongdoing, not of an official's personal wrongdoing); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978). According to defendants, plaintiffs provide no evidence that Baca, Cox, McDaniel, Schreckengost, and Walsh personally denied plaintiffs' requests for reasonable accommodations or discriminated against plaintiffs on the basis of their disability. (ECF No. 78 at 17.) Plaintiffs reference their grievance history and complaint as evidence that Baca, Cox, McDaniel, Schreckengost, and Walsh were aware of plaintiffs' request for accommodations but denied their requests and were directly involved in implementing the level system. (Plaintiffs' Opp. at 53; *see* Plaintiffs' Exh. 6 to Exh. 22.)

All government employees are "persons" under § 1983 and can be sued in their individual capacity for violating clearly established constitutional rights "under color of state law." *Hafer v. Melo*, 502 U.S. (1991). Individual capacity suits cannot be brought on a theory of vicarious liability, so a plaintiff must plead that "each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009); *see also Starr v. Baca*, 652 F.3d 1202, 1206-07 (9th Cir. 2011) (discussing *Iqbal* and explaining that "when a supervisor is found liable based on deliberate indifference, the supervisor is being held liable for his or her own culpable action or inaction, not held vicariously liable for the culpable action or inaction of his or her subordinates.").

A supervisor who does not personally participate may nevertheless establish the requisite causal connection and incur liability under § 1983 if he implements a policy so deficient that the policy "itself is a repudiation of constitutional rights" and is "the moving force of the constitutional violation." *Redman v. Cty. of San Diego*, 942 F.2d 1435, 1446 (9th Cir. 1991). In other words, liability may be established when a supervisor "sets in motion a series of acts by others which the [supervisor] knows or reasonably should know would cause others to inflict' constitutional harms." *Preschooler II v. Clark County School Bd. of Trustees*, 479 F.3d 1175, 1183 (9th Cir. 2007) (internal quotations omitted).

The court agrees with plaintiffs. Plaintiffs' grievance history is evidence that Baca, Cox, McDaniel, Schreckengost, and Walsh, as NNCC supervisors, were given notice of possible

constitutional violations committed against plaintiffs. (*See* Plaintiffs' Exh. 6 at 10 to Exh. 22.) Although denial of a grievance is not generally enough to impose supervisory liability in itself, plaintiffs also allege facts in their verified complaint that show these defendants were directly involved in implementing the level system that resulted in the alleged violations of plaintiffs' constitutional and statutory rights. (Plaintiffs' Opp. at 53.) Defendants do not contest their participation in implementing the level system. Furthermore, plaintiffs provide evidence that NNCC supervisors were aware that NNCC contains architectural "barriers to access for persons with disabilities ...." (Plaintiffs' Exh. 53.) When viewed in the light most favorable to plaintiffs, their evidence is sufficient for a reasonable jury to conclude that Baca, Cox, McDaniel, Schreckengost, and Walsh personally participated in causing plaintiffs harm and may be held liable for the resulting constitutional violations.

G. Qualified Immunity

Finally, defendants argue that qualified immunity shields them from liability. (ECF No. 78 at 17–19.) Government officials performing discretionary functions are entitled to qualified immunity, shielding them from personal liability for civil damages "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (citations omitted). Resolving an official's qualified immunity claims requires two steps: First, the court must consider whether the facts "[t]aken in the light most favorable to the party asserting the injury ... show [that] the [defendant's] conduct violated a constitutional right ...." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Second, the court must determine whether the right was clearly established at the time of the alleged violation. *Id.* These are purely legal questions for the court, and if the court finds both prongs in the affirmative, then qualified immunity does not apply. *See Serrano v. Francis*, 345 F.3d 1071, 1080 (9th Cir. 2003).

Qualified immunity does not apply to Sandoval, Laxalt, and Cegavske because they are defendants solely to provide prospective injunctive relief. *See Eng v. Cooley*, 552 F.3d 1062, 1064 n.1 (9th Cir. 2009); *L.A. Police Protective League v. Gates*, 995 F.2d 1469, 1472 (9th Cir. 1993)

(qualified immunity does not shield against official capacity suits for declaratory or injunctive relief). Nor does qualified immunity apply to Baca, Cox, McDaniel, Schreckengost, and Walsh. Where there are factual disputes as to the parties' conduct or motives, the case cannot be resolved at summary judgment on qualified immunity grounds. *See Lolli v. Cty. of Orange*, 351 F.3d 410, 421 (9th Cir. 2003); *Wilkins v. City of Oakland*, 350 F.3d 949, 955-56 (9th Cir. 2003). The court finds that plaintiffs present triable issues of fact as to whether defendants were deliberately indifferent to plaintiffs needs for accessible outdoor exercise. Whether the officers objectively violated a constitutional right, and whether that right was clearly established at the time of the violation, "may depend upon the jury's resolution of disputed facts and the inferences it draws therefrom." *Id.* at 421 (quoting *Santos v.* Gates, 287 F.3d 846, 855 n.12 (9th Cir. 2002)). Therefore, the court concludes that Baca, Cox, McDaniel, Schreckengost, and Walsh are not entitled to qualified immunity.

IV. CONCLUSION

For the reasons stated herein, the court finds that Seely and Lyons failed to exhaust their administrative remedies for their ADA and RA claim to the extent that it is based upon allegations against the level system. The court further finds that Boston failed to exhaust his administrative remedies for his Eighth Amendment claim and his ADA and RA claim to the extent it is based upon allegations that NNCC exercise facilities are inaccessible to him because they are not ADA-compliant. Additionally, the court finds that Boston has failed to raise a genuine dispute material to his remaining ADA and RA claim. Finally, the court finds that plaintiffs' have failed to raise a genuine dispute material to their Fourteenth Amendment claim. Accordingly, the court recommends that summary judgment is proper as to Boston's claims in their entirety, Seely and Lyons's Fourteenth Amendment claim, and Seely and Lyons's ADA and RA claim to the extent that it is based upon allegations against the level system. Seely and Lyons's Eighth Amendment claim, and ADA and RA accessibility claim, should survive summary judgment.

The parties are advised:

1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, the parties may file specific written objections to this Report and Recommendation within fourteen days of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the District Court.

2. This Report and Recommendation is not an appealable order and any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

V. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that defendants' motion for summary judgment (ECF No. 78) be **GRANTED** as to all claims brought by Boston and that Boston be **DISMISSED** from this action.

IT IS FURTHER RECOMMENDED that defendants' motion for summary judgment (ECF No. 78) be **GRANTED** as to plaintiffs' Fourteenth Amendment claim.

IT IS FURTHER RECOMMENDED that defendants' motion for summary judgment (ECF No. 78) be **DENIED** as to Seely and Lyons's Eighth Amendment claim.

IT IS FURTHER RECOMMENDED that defendants' motion for summary judgment (ECF No. 78) be **DENIED** as to Seely and Lyons's ADA and RA claim to the extent that it is based on allegations against the level system, and **GRANTED** to the extent that it alleges that NNCC's exercise facilities are not ADA-accessible.

DATED: January 8, 2018

Valerie P. Cooke

UNITED STATES MAGISTRATE JUDGE